

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





ORIGINAL

76-7468

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

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H. C. WAINWRIGHT & Co.,

*Plaintiff-Appellee,*

*against*

WALL STREET TRANSCRIPT CORPORATION and  
RICHARD A. HOLMAN,

*Defendants-Appellants.*

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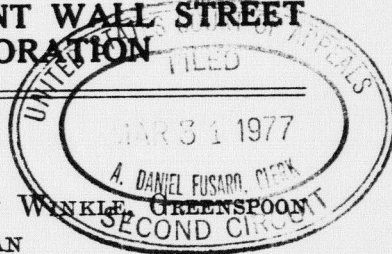
REPLY BRIEF OF APPELLANT WALL STREET  
TRANSCRIPT CORPORATION

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**REPLY BRIEF OF APPELLANT WALL STREET  
TRANSCRIPT CORPORATION**

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**I**

**The plaintiff seeks to subvert the purposes of the  
copyright laws.**

Plaintiff's brief proceeds on the thesis that the Transcript is in some way a competitor of plaintiff. But they are not competitors, and the indisputable fact is that plaintiff is not seeking to protect any market for or any value of its copyrighted material. It does not seek to protect its research reports as research reports. What it is trying to do is to protect, through the use of the copyright laws, its securities' commissions business which it claims (without any proof) results at least in part from its copyrighted research reports. But that is a subversion

of the purposes of the copyright laws and the Constitutional authority vested in Congress to enact copyright laws.

The Constitution (Article I, Section 8, Clause 8) vests in Congress the power:

"To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Clearly, this constitutional limitation upon the power of Congress cannot be extended in any way to protect anything other than the writings as writings; the copyright laws cannot be utilized to protect benefits other than those directly derived from the sale and promotion of the writings. If it were otherwise, then the copyright laws would not be promoting the progress of useful arts.

Although *Anderson's Black Rock v. Pavement Salvage Co.*, 396 U.S. 57 (1969), involved a patent, nonetheless the statement of the United States Supreme Court is just as clearly applicable to copyrights. The Supreme Court there said (p. 61 of 396 U.S.):

"The patent standard is basically constitutional, Article I, § 8, of the Constitution authorizing Congress '[t]o promote the Progress of . . . useful Arts' by allowing inventors monopolies for limited times. We stated in *Graham v. John Deere Co.*, 383 U.S. 1, 6, 15 L Ed 2d 545, 550, 86 S Ct 684, that under that power Congress may not 'enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are



inherent requisites in a patent system which by constitutional command must "promote the Progress of . . . useful Arts." This is the *standard* expressed in the Constitution and it may not be ignored.' " (Emphasis the Court's)

But that standard has been ignored here. The protection sought and obtained by the injunction was not of the useful knowledge set forth in the copyrighted research reports; to the contrary, the protection sought was of the plaintiff's commission business. We respectfully submit that that it a clear subversion of the purposes of the copyright laws and of the constitutional limitation placed thereon. See e.g. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966) cert den 385 U.S. 1009 (1967).

## II

### **Freedom of the press is violated by the injunction here obtained.**

The plaintiff cites no case and we know of no case, in which an injunction has ever been issued under the copyright laws to restrain publications of writings not yet in being and of course not yet copyrighted. Yet that is precisely what the injunction concededly does here.

We respectfully submit that so much of the injunction which restrains publication of writings not yet written and not yet copyrighted is thus a prior restraint violative of the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

As was pointed out in *Anderson's Black Rock*, *supra*, 396 U.S. 57, things which add to the sum of useful knowledge are inherent requisites in a patent system and hence are necessarily inherent requisites in a copyright system since both rest on the constitutional command that they must promote the progress of useful arts. If we assume then

that the research reports are in fact copyrightable, then they contain useful knowledge which is obviously news and reportable as such by the press.

Although the plaintiff cites a few cases in which newspapers have been enjoined under the copyright laws (br. pp. 22-23), none of them holds or even intimates that the copyright laws can be utilized to enjoin the publication of writings not yet in existence and thus not copyrighted. We further submit that none of those cases involved current news event, with the exception of *Chicago Record Herald Co. v. Tribune Assn.*, 275 Fed. 797 (1921). In that case the constitutional issue was not raised and in any event it antedates the decision in *Near v. Minnesota*, 283 U.S. 697 (1931).

Indeed, *Worthy v. Herter*, 270 F. 2d 905 (D.C. Cir. 1959) cert. den. 361 U.S. 918 (1959) involved the right to a passport and travel to various countries, *Worthy* in any event is no longer the law.

Implicit in plaintiff's arguments is the notion that the copyright laws stand higher than do other statutes with respect to the First Amendment. We assert that all statutes are subject in equal measure to the First Amendment. The founding fathers certainly did not give any indication that statutes adopted pursuant to Article I, Section 8, Clause 8 of the Constitution had any higher priority, vis-a-vis, the First Amendment, than any other statute within the powers vested in Congress.

Indeed, as the Supreme Court pointed out in *Nebraska Press Asso. v. Stuart*, 427 U.S. —, 49 L. Ed. 2d 683 (1973) the authors of the Bill of Rights did not even undertake to assign priorities as between the First and Sixth Amendments. In the *Nebraska* case there was a direct clash between the two amendments and although the Supreme Court did not undertake to establish priorities, nonetheless in that case at least the Sixth Amendment had to yield to the First Amendment.



The Supreme Court said (p. 669 of 49 L. Ed. 2d):

"The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, see *Ex parte Milligan*, 4 Wall 2, 18 L Ed 281 (1866), cautions against suspending explicit guarantees."

As Mr. Chief Justice Burger indicated in *Nebraska Press*, prior restraints are anathema to the First Amendment, no matter under what guise or under what statute they may arise. We are here confronted with a prior restraint against publishing something not yet written and hence not yet copyrighted and accordingly not yet protected by copyright laws. We submit that under all circumstances that prior restraint is unconstitutional.

The other aspect relates to the copyrighted research reports which were in existence and as to which the defendants had published news accounts thereof. The defendants had for a period of time been attempting to reach agreement with the plaintiff in an effort to carve out areas of agreement as to what the defendants would or would

not publish. The defendants made every effort to publish accounts of the research reports so as to avoid the use of the style or expression of the plaintiff. (Cf. the two columns at 158A-160A).

Whatever may have been the law prior to 1976, it is perfectly clear that neither the copyright laws nor any other laws can now stand against the First Amendment with respect to the reporting of economic news, especially where, as here, there has been no pirating of the style and expression of the plaintiff. *Virginia State Board of Pharmacy v. Virginia Consumers Council*, — U.S. —, 48 L. Ed. 2d 346, 360 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Parenthetically the Court's statement that there is no tension between the copyright laws and the First Amendment because the doctrine of fair use has been "precisely contoured" to assure the public's access to news and an author's protection (217a), simply cannot be so. That is because at best the doctrine of fair use is, as the Court below indicated, of quicksilver content and varying and overlapping (219a).

Accordingly, the injunction cannot stand before the mandate of the First Amendment which is binding on Congress with respect to the copyright laws or any other statute; nor can the copyright laws be utilized to protect anything other than the written material; and where, as here, they are being utilized to protect the securities' commission business of the plaintiff the injunction may not issue; it is an impermissible prior restraint.

### III

**The plaintiff is utilizing the copyright laws in order to violate the economic laws of this nation.**

The plaintiff weakly argues that there is no evidence to support the claim that plaintiff is utilizing inside information in its copyright reports other than the assertion

by the defendant, Holman, on information and belief, derived from reading the research reports (br. p. 39). That of course is not the case. The plaintiff admitted that it utilized inside information. Thus the plaintiff admitted (6a):

"Basic reports are based upon interviews with one or more company officials".

The plaintiff also admitted that all sources of information, including company officials, provide "important inputs" to the reports (132a), and that the Basic Reports, are circulated to company management for comment (133a). See *SEC v. Geon Industries, Inc.*, 531 F. 2d 39, 47 (2 Cir. 1976).

The naked denial that inside information is utilized in the copyrighted reports cannot stand before the admissions made by the plaintiff before the defendants pointed out that the plaintiff was utilizing inside information. After that fact was pointed out by the defendants, then the plaintiff made the naked denial that it utilized inside information.

The injunction thus puts the Court's imprimatur upon what appears to be illegal activity. In short the Court below has served as the paymaster of the wages of wrongdoing and that, we submit, no Court should do. *Stone v. Freeman*, 298 N.Y. 268 (1948).

#### IV

#### **The Court below abused its discretion in granting the injunction.**

Plaintiff argues that an injunction against publishing news accounts of unwritten research reports not yet copyrighted is proper because the Transcript is likely to publish its accounts in the same manner as it has previously published them and that the injunction bars the defend-



ants from publishing accounts of Wainwright's copyrighted reports in the format of the feature, Wall Street Roundup (br. pp. 34-5). And the plaintiff further argues that it has rights today in connection with matters written in the future and copyrighted in the future.

But the fact of the matter is that plaintiff has no rights in any unwritten matters and attains no rights until it is copyrighted. Indeed, the statute bars the bringing of any proceeding until such time as the copyrighted material has actually been filed with the Patent Office. 17 U.S.C. Sec. 411. Nonetheless, the Court below has enjoined the publication of accounts of this presently unwritten and uncopyrighted material.

No case cited by the plaintiff has ever sustained any such injunction. *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal. 1972) (br. pp. 35-6) related only to existing copyrights and not to material at that point unwritten and uncopyrighted.

Plaintiff contends (ftn. br. p. 38) that it has fully complied with the statutory requirements for copyright. But that necessarily cannot be so with respect to material as yet unwritten. And that contention is a clear concession that there must be full compliance with the statutory requirements for copyright before any action can be brought or any relief granted with respect thereto.

### Conclusion

The injunction constitutes an impermissible prior restraint of freedom of the press. The Court below misapplied the doctrine of fair use; and that doctrine mandates the denial of the injunction.

The plaintiff is clearly utilizing the copyright laws for improper purposes and to assist it in violating the securities laws. The Court below has thus acted as the paymaster of the plaintiff's wrongdoing; and even if the de-

fendants are wrong, nonetheless the Courts should not choose between wrongdoers but leave them where they are.

The public is entitled to know. If plaintiff's clients are entitled to know then so is the public. The plaintiff cannot pick and choose to whom this insider information should be furnished.

Plaintiff is not seeking to protect any literary merit or any expression of its own which may be contained in the copyrighted material. The plaintiff seeks and has obtained protection for its commission business. That is clearly a misuse of the copyright laws and beyond the constitutional mandate that copyright laws are to promote the progress of the useful arts. Here, to the contrary, the copyright laws are being utilized to promote the plaintiff's commissions on the sale or purchase of securities.

The order appealed from should be reversed with costs.

Respectfully submitted,

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~~NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT~~  
 United States Court of Appeals for the Second Circuit

H. C. Wainwright & Co.,  
 Plaintiff-Appellee,  
 against  
 Wall Street Transcript Corporation and  
 Richard A. Holman,  
 Defendants-Appellants.

AFFIDAVIT  
 OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Bernard S. Greenberg

being duly sworn,

deposes and says that he is over the age of 21 years and resides at  
 162 East 7th Street, New York, N.Y.

That on the 31st day of March, 1977 at  
 80 Pine Street, New York, NY  
 he served the annexed Reply Brief of Wall Street Transcript Corp. upon  
 Cahill Gordon & Reindel  
 Attorneys for Plaintiff-Appellee

in this action, by delivering to and leaving with said attorneys

two

true copies thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the  
 person mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 31st

day of March 1977

*Roland W. Johnson*  
 ROLAND W. JOHNSON

Notary Public, State of New York  
 No. 4509705

Qualified in Delaware County  
 Commission Expires March 30, 1977

*Bernard S. Greenberg*





service of ~~the~~ <sup>two</sup> copies of  
the within Reply Brief is  
hereby admitted this 31st day  
of August 1977

Richard A. Holman  
Attorney for  
Amelton Bros